Supreme Court, U.S.
FILED

No. 95-1328 JAN 23 1996

OFFICE OF THE CLERK

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1995

FIRST NATIONAL BANK & TRUST, WIBAUX, MONTANA, and ITS STOCKHOLDERS, Thomas E. Towe Trust, Karen James Trust, Kristin Hartley Trust, Sara Horsfall Trust, Andrew C. Towe Trust, Grant Investments Fund, Irene Koch, and Dorothy Tow,
Petitioners,

v.

THE COMPTROLLER OF THE CURRENCY,
Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Ninth Circuit decision conflicts with relevant decisions of this Court regarding the right of the Petitioners to a pre-deprivation notice and hearing prior to the seizure of their assets.

2. Whether the Ninth Circuit has effectively placed Bank regulators above the Constitution by allowing the seizure of a bank without any process whatsoever.

3. Whether the Ninth Circuit ignored the clear mandate of this Court requiring a showing of exigent circumstances before allowing a government agent to take someone's property without a hearing.

4. Whether there is a conflict in the circuits that should be resolved by this Court regarding the scope of review "upon the merits" in cases involving financial institutions when the evidence that is included in the administrative record is controlled the agency whose decision is being reviewed.

5. Whether this Court's supervision is warranted because the Ninth Circuit has departed from the usual course of judicial proceedings in holding the Petitioners do not fit any of the exceptions under the Administrative Procedures Act that allow a supplementation of the administrative record.

6. Whether this Court's supervision is warranted because the Ninth Circuit has departed from the usual

course of judicial proceedings in affirming the District Court's conclusion the appointment of a conservator was not arbitrary, capacious and abuse of discretion or otherwise not in accordance with the law.

LIST OF ALL PARTIES

PETITIONERS:
FIRST NATIONAL BANK & TRUST, WIBAUX, MONTANA, and ITS STOCKHOLDERS, Thomas E. Towe Trust, Karen James Trust, Kristin Hartley Trust, Sara Horsfall Trust, Andrew C. Towe Trust, Grant Investments Fund, Irene Koch, and Dorothy Tow.

Wibaux Investments is a successor in interest to Grant Investments Fund.

RESPONDENT:
THE COMPTROLLER OF THE CURRENCY,

There are no parent companies or non-wholly owned subsidiaries.

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Pursuant to Rule 10 of the Rules of this Court, the Petitioners listed above, by and through their attorneys, Towe, Ball, Enright, Mackey, and Sommerfeld, respectfully petition for a writ of certiorari.

CITATION OF OPINIONS AND ORDERS ENTERED IN THIS CASE

(1) Decision of the Comptroller of the Currency to appoint a conservator for the First National Bank and Trust, Wibaux, Montana, dated June 24, 1992. (This Decision is 124 pages long. Petitioner does not believe it is necessary for the determination of the issues raised in this Petition for Certiorari and is not reproduce.)

(2) District Court Order of December 2, 1992. (Appendix 2, A-6 to A-11.)

(3) District Court Memorandum and Order of November 20, 1992. (Appendix 3, A-12 to A-20.)

(4) District Court Order of August 9, 1993. (Appendix 4, A-21 to A-33.)

(5) Judgment, August 9, 1993. (Appendix 5, A-34.)

(6) District Court's Order of February 25, 1994. (Appendix 6, A-36 to A-37.)

(7) Ninth Circuit Court of Appeals Decision and Opinion, dated August 21, 1995, 63 F.3d 894. (Appendix 7, A-38 to A-53.)

(8) Ninth Circuit Court of Appeals Order denying Petition for Rehearing of October 30, 1995. (Appendix 8, A-54 to A-55.)

STATEMENT OF JURISDICTION

(1) The date of the Ninth Circuit Decision and Opinion is August 21, 1995. (2) The date of the Order denying Rehearing and rejecting Suggestion for Rehearing En Banc is dated October 26, 1995. (3) The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). (4) The constitutionality of an act of Congress is drawn into question and 28 U.S.C. §2403(a) may apply. However, since an agency of the United States is a party, certification to the Attorney General or the Solicitor General is not required.

CONSTITUTIONAL AND STATUTORY PROVISIONS

(1) Fifth Amendment to the Constitution to the United States:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public dangers; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, or be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation.

(2) 12 U.S.C. §203A (The Bank Conservation Act) See Appendix 1, Page A-1 to A-5.

STATEMENT OF THE CASE

Jurisdiction of the District Court was invoked under 12 U.S.C. §203(b) which authorizes judicial review of the appointment of a conservator under 12 U.S.C. §203(a).

Petitioners brought a judicial review of the appointment of a conservator for their bank on July 6, 1992, seeking a termination of the appointment of the conservator. Petitioners immediately sought a post-seizure hearing which was denied on September 2, 1992. Petitioners then sought to obtain discovery and was faced with a motion for protective order which was granted on November 20, 1992.

Upon cross motions for summary judgment, the District Court denied Plaintiff's motion and granted Defendant's motion on August 9, 1993.

On appeal to the Ninth Circuit, the decision of the District Court was affirmed on August 21, 1995. Petitioners' petition for rehearing was denied and Petitioners' suggestion for rehearing en banc was rejected on October 30, 1995.

STATEMENT OF FACTS

This case involves an abuse of the authority

Congress gave bank regulators under FIRREA (Financial Institutions Reform, Recovery, & Enforcement Act of August 9, 1989). Although Congress intended the Act for use in connection with failing savings and loan associations and other financial institutions, the Comptroller (hereinafter "OCC") **applied it to a healthy bank** and used it in this case as authority to seize control **the strongest bank in Eastern Montana**. (Affidavit (hereinafter "Aff'd"), T. Towe, Appendix (hereinafter "App.") 11, p. A-59.)

The abuse was compounded by the fact that the OCC stood by and watched while a failing bank was completely rehabilitated, and then, without warning, seized the Bank under 12 U.S.C. §203(a).

Edward Towe has been a successful banker since 1949, having owned, managed, and operated 14 small country banks, some of which were failing when he took them over. Most of them were sold in 1973, and Edward Towe essentially retired from banking at that time. (First Affidavit of Edward Towe, September 5, 1992, attached to Memorandum filed as Docket #29, hereinafter "1st Aff'd. of E. Towe," at 1.)

Edward Towe came out of retirement on January 15, 1987, when the Towe Family acquired controlling interest in the First National Bank and Trust, Wibaux, Montana (hereinafter "Bank"). Edward Towe took over the active, full-time management of the Bank as President and CEO. Ibid.

At the time Edward Towe took over, the Bank was near insovlent. The capital accounts were approximately $211,000 with a capital ratio of 1.66%. This small rural Montana bank was losing $15,000 per month and would have failed within the year. Id. at 2. It had repossessed 10 houses, 28 mobile homes, 1 farm, 2 large apartment houses, 1 motel, and a bar. (Testimony of H. O. Burt Price, (hereinafter "Price."), reproduced in App. 12, p. A-89 to A-90.)

Calling upon his many years banking experience, his superior collecting and liquidating abilities, and the assistance of two family organizations that he managed and controlled, Edward Towe turned the Bank around. He sold all of the repossessed properties, increased the capital to $1,884,000, and showed a profit of nearly $20,000 per month. (Price pp. A-89 to A-90; 1st Aff'd. of E. Towe, at 2-3.) Five and one-half years later, at the time the OCC seized the Bank, the Bank had an equity capital ratio of 14.31%, over twice the national average (6.51%) which made it the strongest bank in Eastern Montana and the 8th strongest bank in the entire State out of 143 banks. (Aff'd of T. Towe, p. 8-59.) See the charts at App. 9 (p. A-56) and 10 (p. A-57).

Unfortunately, however, the young, ambitious, and inexperienced OCC examiners soon labeled Edward Towe as "uncooperative." This label was included in the internal memorandums that were reviewed by each examiner in charge before visiting the bank, thereby influencing each subsequent examiner. (Price p. A-107; Testimony of William Grant at the same hearing (hereinafter "Grant")

App. 14, pp. A-143 to A-145.)

On June 24, 1992, the OCC appointed a conservator to take over the operation of the bank and, the next day, with the assistance of U. S. Marshals and a Deputy Sheriff, entered the Bank, changed all of the locks, and effectively excluded the President, Directors, and Stockholders from any contact with their property ever since. (Complaint at 2; Aff'd of T. Towe of September 6, 1995, at 1-2.)

The "Decision" to appoint a conservator pursuant to 12 U.S.C. §203(a)[1] was 124 pages long. It was prepared entirely in secret without any prior notice or input whatsoever from the Petitioners. It raised a number of issues for the first time that had never been discussed before with the Officers and Directors of the Bank. It also concluded the tests for appointment of a conservator [12 U.S.C. § 203(a)] had been met without ever giving the Petitioners an opportunity to comment on the issue. To this day, Petitioners have never had an opportunity to present evidence or to cross-examine the witnesses against them with regard to whether the requirements of § 203(a) have been met.

On May 20, 1991, just four months before the final examination by the OCC, which prompted the takeover, the State of Montana examined the Bank. The examiner in charge of that state examination was William

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[1]The section of this code then in effect and applicable to this case is set forth in Appendix 1. 12 U.S.C. § 203(a) has since been amended.

Grant, the state's Chief Examiner, a seasoned examiner with far more experience than the young OCC examiners, namely, experience examining financial institutions for the Federal Reserve System, the Office of Thrift Supervision, the Farm Credit Administration, and the Federal Home Loan Bank, as well as the State of Montana.

Had Petitioners been allowed to present any evidence in this case, Mr. Grant's testimony and report would have been presented.[2] The report, written before the takeover, stated that Mr. Grant found Edward Towe to be cooperative. Mr. Grant's inspection revealed only minimal, technical exceptions and no violations of law. Mr. Grant did not generally concur with the OCC's position and findings in their previous examination reports and the OCC's review was "unduly or unnecessarily harsh." (Grant, pp. A-136 to A-142.)

Mr. Grant stated that most of what President Towe did was "what any experienced capable CEO would have done to adequately protect the interest of his bank." (Grant, p. A-136.) Had Petitioners been allowed to present this evidence, it would have had significant impact on the decision and judicial review of this case.

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[2]This report and Mr. Grant's testimony was presented in a proceeding in which the OCC attempted to use the exact same reasons they used to appoint a conservator as the basis to remove Edward Towe and Thomas Towe from their office and prohibit them from ever again engaging in banking in the United States under 12 U.S.C. § 1818(e) and to assess civil money penalties against the same parties under 12 U.S.C. § 1818(i). His testimony at that hearing is reproduced in Apps. 13 & 14, pp. A-117 to A-146.

Additional evidence Petitioners sought to introduce but were not allowed to present because no hearing was granted at any stage of the proceedings was the evidence from expert witness H. O. "Burt" Price. Burt Price has 40 years banking experience, 31 years with the Office of the Comptroller of the Currency, including the examination of over 60 different banks in which he was the Examiner in Charge of over 500 examinations. He was obviously considered one of the OCC's top field examiners, having been called upon for special assignments to problem and failing banks and, in one instance, to review an allegation of bias and prejudice against the examiners. He received the Senior National Bank Examiner title, one of only 25 in the United States, the Albert Gallatin Award, and numerous other awards and recognitions. (Aff'd. of T. Towe, pp. A-59, A-60, A-68 to A-72.)

By affidavit, Petitioners submitted to the District Court a number of Mr. Price's specific findings and conclusions as they related to some of the specific charges in the "Decision." (Id. at A-73 to A-83.) Had he been allowed to testify at any hearing during the course of the proceedings, either before or after the seizure of the Bank, Mr. Price would have stated the examination reports and the work of the field examiners were not adequately documented and did not represent factual, typical or normal criticisms. Further, those criticisms which were documented did not support the conclusions

reached by the OCC.[3] (Price, pp. A-86, A-87.)

Further, Mr. Price states the examination reports indicate management received little credit for the improvement clearly established by the figures, including a substantial reduction in credit exception, collateral exceptions, improvement in the capital, the earnings, and liquidation of repossessed collateral. (Price, pp. A-88 to A-90.)

Mr. Price stated the upgrade from a CAMEL 5 to a CAMEL 4 rating just prior to the takeover is inconsistent with the actions of the OCC in taking over the Bank. (Price, p. A-91.) Mr. Price indicated the OCC demonstrated an apparent lessening of concern by less frequent examinations - the Bank was examined every six months at the beginning of the five-year period and only once every two years at the end. (Price, p. A-92.)

Mr. Price criticized the OCC for not working with the Bank to help solve problems inherited from the previous managment such as the 2 apartment houses. He criticized the OCC's behavior in connection with one of the appraisals. (Price, pp. A-93, A-97.)

Mr. Price severely criticized the OCC examiners for using inappropriate language such as "concealing,"

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[3]In fact, this is exactly what he stated in a hearing on another case, namely, the Administrative proceedings in which the OCC sought removal of the Towes from Banking for the very same reasons. See App. 12, pp. A-84 to A-116.

"falsifying records," "diversion of funds," "schemes," and so forth, when the evidence did not support the use of such language. There was a paper trail for all the transactions which destroys any contention of concealment, diversion of funds, schemes, etc. (Price, p. A-98.)

Perhaps of most significance to this case and to this Court, Mr. Price found evidence of bias in the way the OCC treated Edward Towe in its criticism of compliance with the Cease & Desist Order. He pointed out that the exact same examiner, Kyle Cox, examined the Bank one year after the conservator was appointed and found the same violations of the Cease & Desist Order. However, this time the attitude was completely different - the alleged violations were considered technical and easily corrected and excusable. At that time Cox acknowledged it was the responsibility of Executive Vice President Huether to complete the forms. When the exact same person was responsible under Edward Towe's management, the exact same violations were considered unsafe and unsound banking practices and Edward Towe was personally blamed. (Price, pp. A-99 to A-102.)

Mr. Price felt alternative courses of action would have been more appropriate than taking over the Bank, including sending more senior examiners with more experience to investigate the allegation of bias and prejudice, and the use of a Cease & Desist Order to provide an opportunity for a hearing on the legal issues

on which the OCC and the Bank disagreed.[4] (Price, pp. A-104 to A-106.)

Mr. Price did not feel the Bank was treated fairly and in an unprejudiced manner. He referred specifically to one of the examiners who used to live in Wibaux and whose father was an owner and participant in the previous management which had caused the Bank to come so close to failure and who was a business partner of Edward Towe's business nemesis. Mr. Price stated the internal memos and examination reports should have been purged so future examiners could not have been influenced by this examiner who had a conflict of interest. (Price, pp. A-106, A-107.)

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[4]The evidence would show, had the Petitioners been able to present it, that the OCC did commence proceedings under 12 U.S.C. §1818 for a Cease & Desist Order regarding several matters following the September 1988 Examination. The Bank challenged the Cease & Desist Order, and the matter was presented to an Administrative Law Judge who ruled essentially for the Bank. The OCC appealed to the Comptroller and obtained a partial reversal, but the decision was still very beneficial to the Bank. On one issue, the adequacy of the allowance for loan and lease account, the Bank prevailed entirely, and the Bank believes that one of the reasons the OCC hesitated to use the same procedure on some of the other legal issues in which the parties differed is their fear of losing again. (Aff'd of T. Towe of October 2, 1992 at 10-11.) It is clearly easier for the OCC to solve a legal disagreement on the interpretation of a regulation by taking over the bank in an ex parte action and preventing the officers and stockholders from using the bank's own resources to defend itself and by making access to the documents and exhibits more difficult than to go to hearing on the issues.

In addition, the bottom line, a most important item in any examination, was almost totally ignored. Mr. Price cited several other instances of documented bias on the part of the Field Examiners. (Price, pp. A-107 to A-112.)

Mr. Price criticized the attitude of the Field Examiners and suggested they violated the National Bank Examiner Handbook which cautions examiners from losing their dignity, stature, and respect and failure to exercise courtesy. (Price, pp. A-112 to A-114.)

Finally, Mr. Price indicated he had worked with many banks who were in much worse condition, with less capital, poorer earnings, weaker management, management with poorer prior records and not showing the type of improvement indicated by this bank, and none of these were ever taken over by the OCC. (Price, p. A-114.)

Mr. Price further pointed to the lack of any evidence of personal dishonesty, of action which significantly affected the safety and soundness of the Bank, lack of evidence that the Bank would suffer any significant financial losses or damages from any of the questions raised by the OCC, and the lack of any evidence that any of the Officers and Directors excluded from the Bank received any inappropriate financial benefits. (Price, p. A-116.)

Had the Petitioners been given an opportunity at any stage in the proceedings to present this evidence and

the background documents and exhibits to support these conclusions, it would have made a substantial difference in the outcome.

If Petitioners had an opportunity to do so, they would also have presented evidence that the OCC gave a cash bonus and award to one of the examiners for testifying at an administrative hearing against the Bank. Additionally, substantial cash awards were given to six of the examiners who examined the Bank in 1989 and 1991, including one award of $2,500. Seven additional examiners received special certificates of appreciation. (Copies of each award and certificate were introduced into evidence as Exhibit R-85 in the Removal Proceedings.) The Petitioners contend the awards were given for their willingness to prepare a censorious, captious, and caviling report against the Bank and its Officers and that this knowledge of the award potential affected the results.

The OCC made no attempt to present any evidence whatsoever to show any emergency or "extraordinary" circumstances justifying the dispensing with ordinary due process protections.

ARGUMENT

I.

THE PETITIONERS' PROPERTY HAS BEEN SEIZED, RETAINED, AND SOLD BY THE GOVERNMENT

WITHOUT ANY HEARING EITHER BEFORE OR AFTER THE SEIZURE.

A most sacred principle of American constitutional law is that a government cannot seize a person's property without notice and a meaningful opportunity to be heard before the taking. Fuentes v. Shevin, 407 U.S. 67 (1972); United States v. James Daniel Good Real Property, 510 U.S. ___, 126 L.Ed.2d 490, 503 (1993); Propert v. District of Columbia, 498 F.2d 1327 (D. D.C. 1991). As this Court stated in James Daniel Good, supra:

> The right to prior notice and a hearing is central to the Constitution's command of due process. "The purpose of this requirement is not only to insure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment - to minimize substantively unfair or mistaken deprivations of property ... ." Fuentes v. Shevin, 407 U.S. at 80-81, 32 L.Ed.2d 556, 92 S.Ct. 1983.

126 L.Ed.2d at 503.

In the instant case, the Petitioners' property was taken without any notice and without any opportunity to be heard. The Bank and all of its assets is certainly substantial property.

It is not just a question of "prior notice" and a "predeprivation hearing." In this case, the deprivation has become permanent; the OCC now claims it has sold the property to others.[5] At no time have the Petitioners received a hearing or a meaningful opportunity to present evidence in opposition to the taking or to cross-examine witnesses against them.

The OCC issued an Administrative Decision prepared in secret without any opportunity on the part of Petitioners to challenge the evidence, present their own evidence, or cross-examine witnesses regarding the sufficiency of elements necessary to justify a taking under 12 U.S.C. § 203(a). When the District Court denied Petitioners' Motion for a Post-Deprivation Hearing, signed a Protective Order prohibiting the Petitioners from conducting any discovery, and refused to admit or consider any evidence not considered or presented by the OCC in its record carefully and secretly prepared, the Petitioners have been denied all process whatsoever. As the D.C. Circuit said in Propert v. District of Columbia,

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[5]The Conservator and the OCC entered into an agreement with First West Bank Glendive (a competitor in the neighboring town) to sell all of the assets and assume all of the liabilities in an asset purchase agreement which contemplates a liquidation of the Bank. The Conservator insists that he completed this transfer on November 3, 1995, but the OCC will not let him distribute any of the proceeds from the sale of the assets until after the expiration of two years. Petitioners insist the sale price was at least $400,000 less than what the Bank itself was truly worth. Petitioners' applications to Sandra Day O'Connor and Ruth Bader Ginsburg to reinstate the stay order of the District Court after the Ninth Circuit vacated it were denied.

948 F.2d 1327, 1332 (D.C. Circ. 1991):

> The amount of process required can never be reduced to zero - that is, the government is never relieved of its duty to provide some notice and some opportunity to be heard prior to final deprivation of a property interest.

(Emphasis in original.) As stated by this Court:

> "Fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights. ... No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it.

Joint Anti-Fascist Refugee Committee v. McGrath, 341 U. S. 123, 170-72, 95 L.Ed. 817, 71 S.Ct. 624 (1951) (Frankfurter, J., concurring) as cited with approval by the majority opinion in James Daniel Good, supra, 126 L.Ed.2d 504.

Judicial review under an arbitrary and capricious standard on a spoon fed record that contains only the evidence the agency wants the reviewing court to see, is no protection at all. The agency is virtually free to do anything it wants. The instant case is a perfect example. This is not a troubled bank that is in danger of insolvency. This is the strongest bank in Eastern Montana, a bank

that has equity capital of over twice the state and national average and a bank that even the OCC acknowledges has greatly improved. (See pp. 6, 10, supra.)

Burt Price found **evidence of bias, prejudice, and conflict of interest** on the part of the OCC examiners which tainted all subsequent examinations. (Price, pp. A-99 to A-114.) So did William Grant. (Grant, pp. A-144, A-145.) See also, the inconsistent conclusions on major issues used to justify the OCC's actions, and failure to utilize more appropriate alternatives. (Ibid.) Building on inflamatory words such as "concealed," "falsified records," "diversion of funds," and "schemes," which were factually inaccurate, plus incorrect legal conclusions and factual conclusions, the young examiners persuaded their superiors who in turn persuaded the Courts to reach ultimate conclusions which were simply wrong. (Price, pp. A-86, A-87, A-98, A-116; Grant, pp. A-136 to A-142.) The younger, ambitious, and less experienced examiners assigned to this bank by the OCC reached conclusions which more experienced examiners simply did not agree with. (Ibid.)

In short, a mistake has been made which the Petitioners have been powerless to correct. Because of the unfair process, Petitioners have been erroneously deprived of their property. This would not have happened if a fair hearing had been allowed at **any** step of the procedure. Judicial review on an arbitrary and capricious standard of a secret, one-sided determination of the facts in which the record was carefully limited to the evidence the OCC wanted the Courts to see, is not any process, let alone due

process. This is not justice. This should not be allowed and should not be tolerated in America.

II.

THE MATTHEWS V. ELDRIDGE TEST APPLIES ONLY TO POSTPONEMENT OF A PREDEPRIVATION HEARING, NOT THE ELIMINATION OF A HEARING ALTOGETHER. FURTHERMORE, ALL THREE FACTORS FAVOR PETITIONERS.

The Ninth Circuit states that a predeprivation hearing may be postponed where some valid governmental interest is at stake, citing Good, supra, and Matthews v. Eldridge, 424 U. S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2nd 18 (1976). App. 7, p. A-43; 63 F.3rd at 896. First, this case does not involve the "postponement" of a predeprivation hearing. This case involves the taking of a citizen's property **without a hearing at anytime**. As the District of Columbia Circuit stated in Propert v. District of Columbia, 948 F.2d 1327, 1332:

> Nevertheless, however weighty the governmental interest may be in a given case, the amount of process required can never be reduced to zero - that is, the government is never relieved of its duty to provide some notice and some opportunity to be heard prior to final deprivation of a property interest.

This Court made the same point in Logan v. Zimmerman Brush Co., 455 U. S. 422, 434, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982) when it stated:

> The state may not finally destroy a property interest without first giving the putative owner an opportunity to present his claim of entitlement.

Accord Parratt v. Taylor, 451 U. S. 527, 540, 101 S.Ct. 1908, 1915, 68 L.Ed.2d 420 (1981); Good, supra, 126 L.Ed.2d at 504, 508-09.

Furthermore, each of the three factors set forth in Matthews v. Eldridge, 424 U. S. 319, 335 (1976), favor the Petitioners. First, the private interest affected in the instant case is the right of the Stockholders to manage their own property, run their own bank, and receive its earnings. With a sale of this property by the OCC, it is hard to imagine a stronger private interest.

Second, the Government's interest is limited to sick or failing banks where there is a real possibility that the Government may have to step in under the insurance provisions or to protect the depositors. The strongest bank in Eastern Montana is not in that category. The Ninth Circuit suggests the Government interest is strong because while the Bank may not have been on the verge of collapse, it was obviously troubled. In fact, this is the very issue with which Petitioners sought to disagree but were not permitted to challenge the evidence presented by the OCC nor present their own evidence. As previously

stated, by June 30, 1992, the Bank had total capital accounts of $1,884,000 which gave the Bank an equity capital ratio of 14.31%. By contrast, the state average is 7.97%, and the national average is 6.51%. (Apps. 9, 10, A-56, A-57.) Any possible governmental interest in protecting the depositors, the public, or even the insurance fund with the record of capital growth shown by the Bank since Edward Towe assumed control ($321,000 to $1,884,000 and growing) is ludicrous. (See Charts, Ibid.)

Third, the risks of erroneous deprivation clearly mitigate in favor of Petitioners. According to far more experienced field examiners, the OCC was simply wrong this time in this case. Furthermore, to suggest, as the Ninth Circuit does, that the post-deprivation review by the District Court, which limited the review to the spoon-fed record the OCC wanted the District Court to see and then used an arbitrary and capricious standard, simply does not minimize the risk of an erroneous deprivation. Such a statement (Ninth Circuit Opinion at 896) flies in the face of this Court's clear pronouncement in Good:

> Fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights.

126 L.E.2d at 504. The Matthews v. Eldridge test supports Petitioners, not the OCC.

III.

THE NINTH CIRCUIT TOTALLY

IGNORED THIS COURT'S MANDATE THAT EXCEPTIONS TO THE REQUIREMENT OF PREDEPRIVATION NOTICE AND HEARING ARE LIMITED TO EXTRAORDINARY SITUATIONS ONLY.

This Court requires not only a showing of some valid governmental interest but also a showing of extraordinary situations or exigencies before the general rule requiring predeprivation notice and hearing can be discarded.

> We tolerate some exceptions to the general rule requiring predeprivation notice and hearing, but only in "'extraordinary situations where some valid governmental interest is at stake....'"

Good, supra, 126 L.Ed.2d at 503. The mandate of this Court was then repeated, so there can be no mistake.

> Unless exigent circumstances are present, the due process clause requires the government to afford notice and a meaningful opportunity to be heard before seizing real property subject to civil forfeiture.

Good, supra, 126 L.Ed.2d at 508-09. Accord Fuentes v. Shevin, supra, 407 U. S. at 70-71; Connecticut v. Doehr,

501 U. S. 1, 115 L.Ed.2d 1, 111 S.Ct. 2105 (1991).

The OCC made absolutely no attempt to show any extraordinary circumstances or any exigency that would require immediate action in the instant case. Nor did the Ninth Circuit even discuss the issue. Indeed, according to Burt Price, Petitioners' expert, one of the principal reasons the action taken was wrong is because alternative courses of action **would have been more appropriate**. (Price, p. A-104 to A-106.) Under this Court's mandate, therefore, exigent circumstances could not be established.

> To establish exigent circumstances, the government must show that less restrictive measures ... would not suffice to protect the government's interest.

Good, supra, 126 L.Ed.2d at 508-09.

The whole point of this Court's decision in Good, supra., was that unlike yachts and personal property that might disappear, the real property involved in Good "cannot abscond." 126 L.Ed.2d at 505, 507. As applied to the instant case, a bank cannot abscond, and with clear evidence that the Bank was growing stronger every day, there is no way the Government could have shown exigent circumstances.

IV.

THE PETITIONERS HAVE NEVER

HAD AN OPPORTUNITY TO ADDRESS THE REQUIRED FACTORS UNDER 12 U.S.C. § 203(a).

The Ninth Circuit completely missed the point in holding that the Comptroller considered the "substance" of the Bank's position. (Opinion at A-48, A-50, A-51; 63 F.2d at 898-99.) The critical issues in the decision to take over a Bank and appoint a conservator is not the ongoing concerns of the OCC as reflected in the Examination Reports but whether the requirements of §203(a) have been met.

In this case, the OCC invoked §203(a)(5) which requires proof of conditions "likely to cause insolvency or substantial dissipation of assets ... [or which are] likely to weaken the bank's condition ...." Petitioner's most vigorous protest appears on this issue. On this issue, Petitioners were not allowed to present any evidence at any time; it was never an issue before the OCC sought to secretly take over.

In addition, the OCC invoked §203(a)(7) which requires proof of "a willful or continuing violation" of a Cease & Desist Order. Again, Petitioners vigorously protest this issue. The Order, which largely required the adoption of policies and procedures, was complied with and the weakness in paper work and reporting requirements, if any, was not the President's assigned responsibility. A year later, the Conservator had the same deficiencies with the same personnel. (Price, p. A-99 to A-102.) On this point, the Petitioners have never had an

opportunity to present their case, informally or formally.

Without establishing one or both of these factors, the OCC has no authority to appoint a conservator under 12 U.S.C. §203(a). Clearly, the Comptroller has not considered the "substance" of the Bank's position on these two critical elements because it had not even seen the Bank's position when it acted and when it prepared the administrative record. Furthermore, neither the District Court nor the Ninth Circuit has seen the Bank's position. It is hard to imagine a more flagrant violation of a citizen's procedural rights. Due process, under this case, is in shambles.

V.

THE NINTH CIRCUIT MISCONSTRUED CASES IN THE FIFTH, EIGHTH, & TENTH CIRCUITS. IF IT DID NOT, THERE IS A CLEAR CONFLICT IN THE CIRCUITS ON THE INTERPRETATION OF "UPON THE MERITS" CONTAINED IN 12 U.S.C. § 203 (b)(1).

Petitioners cited lower court cases from the Seventh, Sixth, and D.C. Circuits suggesting the interpretation of the statutory language "upon the merits" contained in 12 U.S.C. § 203(b)(1) allows a bank or other financial institution to supplement an ex parte record. Seventh Circuit: Collie v. Federal Home Loan Bank

Board, 642 F.Supp. 1147, 1149-52 (N.D. Ill. 1986). Telegraph Savings & Loan Association v. FSLIC, 564 F.Supp. 862, 868-70 (N.D. Ill. 1981). D.C. Circuit: Haralson v. Federal Home Loan Bank Board, 655 F.Supp. 1550, 1559-60 (D. D.C. 1987), appeal dismissed 837 F.2d 1123 (D.C. Circ. 1988). Sixth Circuit: Marietta Franklin Securities Company v. Muldoon, 770 F.Supp. 1212, 1220-23. See also Fidelity Savings & Loan Association v. Federal Home Loan Bank Board, 540 F.Supp. 1374, 1377 (N.D. Calif. 1982); Meyer v. Fidelity Savings, 934 F.2nd 562 (9th Circ. 1991); Salinas Valley Community Federal Credit Union v. National Credit Union Administration, 564 F.Supp. 701, 706-07 (N.D. Calif. 1983.)

These cases contrast "upon the merits" with the more usual "on the record" and hold, as a minimum, "upon the merits" requires a review in which the agency does not necessarily control the evidence which reaches the reviewing court.[6] A court, therefore, must afford the Plaintiff a meaningful opportunity to make a case in opposition to the appointment of a conservator; failure to do so would violate due process. Collie, 642 F.Supp. at 1151, 1152; Haralson, 655 F. Supp. at 1560; Telegraph Savings, 564 F.Supp. at 869; Marietta Franklin, 770 F.Supp. at 1223.

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[6]Telegraph Savings, supra, Collie, supra, Marietta Franklin, supra, and Haralson, supra, all interpret 12 U.S.C. § 1464(d)(6)(A) (1988) (current version at 12 U.S.C. § 1464(d)(2)(B) (1994)) which contain identical language to 12 U.S.C. §203(b), namely, "upon the merits."

The Ninth Circuit rejects this reasoning and holds, instead, that the phrase "upon the merits" does not require either a full adversarial and evidentiary hearing nor a de novo review and denies Petitioner's right to supplement the administrative record. In doing so, it relies on Franklin Savings Association v. Director, Office of Thrift Supervision, 934 F.2d 1127, 1140 (10th Circ. 1991) cert. den. 503 U. S. 937 (1992); Woods v. Federal Home Loan Bank Board, 826 F.2d 1440, 1409 (5th Circ. 1987) cert. den. 485 U. S. 959 (1988); and Guaranty Savings & Loan v. Federal Home Loan Bank Board, 794 F.2d 1339, 1342 (8th Circ. 1986).

Petitioners deny that these cases, properly applied, would prevent the supplementation of the record in the instant case. In point of fact, massive amounts of evidence were allowed at the district court level in all three cases.[7] Further, in each case, the court was dealing with a very sick and insolvent financial institution which is hardly the same as the healthy bank involved in the instant case. On this point, the Ninth Circuit was in error.

If, however, these cases from the Fifth, Eighth,

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[7]In Woods, supra, the district court compiled a record which included a multi-volumed exhibit and affidavits in opposition to the Bank Board's position. 826 F.2d at 1411. Similarly, in Guaranty Savings, the district court permitted the plaintiff to submit a "great deal of testimonial and physical evidence." 794 F.2d at 1341. In Franklin, the lower court permitted supplementation of the record with 25 live witnesses, 18 depositions, and 650 trial exhibits. This was subsequently overturned by the Tenth Circuit.

and Tenth Circuits (combined now with the Ninth Circuit) do as the Ninth Circuit contends, namely, prevent any supplemental submission of evidence in performing the judicial review under 12 U.S.C. § 203(b), they are clearly inconsistent with clear and well-reasoned decisions in the Sixth, Seventh, and D.C. Circuits. It is respectfully submitted the far better logic lies with the lower court cases in the Sixth, Seventh, and D.C. Circuits.

VI.

THE BANK SHOULD HAVE BEEN AFFORDED THE OPPORTUNITY TO CONDUCT DISCOVERY UNDER RECOGNIZED EXCEPTIONS TO REVIEW OF THE RECORD UNDER THE APA.

The Ninth Circuit states that none of the Administrative Procedures Act recognized exceptions to the general rule limiting judicial review to the administrative record apply in this case. Opinion, p. A-49; 63 F.3d at 898. The Ninth Circuit does not explain this statement.

Petitioners suggest the APA is inapplicable in that it does not address "takings" cases governed by the Due Process Clause of the Constitution and that it is designed to apply only to those cases where a lengthy and complete hearing has been held at the administrative level to develop a full record. That has not happened in the instant case.

Nevertheless, Petitioners suggests that at least three of the four APA exceptions apply. First, effective judicial review cannot be performed without supplementing the record in the instant case. This much must be done to determine that all relevant factors were considered. Public Power Council v. Johnson, 674 F.d 791, 794 (9th Cir. 1982); Asarco, Inc. v. EPA, 616 F.2d 1153, 1160 (9th Cir. 1990).

Second, there is need for discovery in this case to clarify technical terms and to assist the Court in evaluating the reasonableness of the agency's actions. Public Power Council v. Johnson, 674 F.2d 791, 794 (9th Cir. 1982) citing Exxon Corp. v. Department of Energy, 91 F.R.D. 26, 40 (N.D. Tex. 1981); see also Bunker Hill Company v. EPA, 572 F.2d 1286, 1292 (9th Cir. 1977). Critical terms such as "covered transactions" as used in 12 C.F.R. § 7.3025 and "affiliate" and "preferential treatment" as set forth in 12 U.S.C. § 371 and 371(c) are technical terms that need clarification.

Third, the Petitioners contend a lack of good faith existed when the OCC instructed the Bank to sell the condominiums, but when a proposed sale was offered, the OCC said to please refrain. The OCC never made a further direct answer but it later criticized the Bank for not doing exactly what the OCC told the Bank not to do. Understandably, this correspondence and these letters were not made a part of the administrative record. (The letters were attached to the affidavits submitted to the District Court. See ER #40(d) and (e)).

There is further evidence of bad faith on the OCC's reluctance to use administrative proceedings to determine several complicated legal issues on which the parties disagreed. Having lost in a previous administrative proceeding, the OCC chose to resolve future disputes by taking over the Bank so it would not have to face a hearing and the Bank would not have its own resources and documents to defend itself. Burt Price acknowledges that alternative courses of action would have been more appropriate, including a new cease and desist order. (Price, pp. A-104 to A-106.)

VII.

THE NINTH CIRCUIT AND THE DISTRICT COURT ERRED IN FAILING TO OVERTURN THE OCC DECISION ON THE GROUNDS THAT IT WAS ARBITRARY AND CAPRICIOUS.

The Petitioners raised several examples of the failure of the OCC to consider important aspects of the problem and several examples of the OCC evaluation lacking record support. Thus, they clearly met the arbitrary and capricious standard.

The Ninth Circuit sidesteps this entire issue by stating "the willful or continuing violation of a cease and desist order independently warrants appointment of a conservator, regardless of whether such violations place a

bank at financial risk." Opinion, A-51; 63 F.3d at 899. This implicitly recognizes Petitioners have met their burden on the other issues. Then, the Ninth Circuit claims a "willful or continuing violation" is established by incidental violations of policies required to be adopted by the Order, but not direct violations of the Order itself. If the Cease & Desist Order is strictly construed against the OCC who drafted it, fundamental rules of statutory and documentary construction require that a different meaning be given to the article that requires "adherence" to policies than to the articles that do not. People ex rel State Water Resources, Control Board v. Environmental Protection Agency, 511 F.2d 693 (9th Circuit 1975); Nieto v. Ecker, 845 F.2d 868 (9th Cir. 1988); 2A Sutherland, Statutory Construction 119-20, § 46.06. Failure to recognize that difference is to be arbitrary and capricious.

CONCLUSION

WHEREFORE, IT IS RESPECTFULLY SUBMITTED the Petition for Certiorari should be granted.

Respectfully submitted this 22nd day of January, 1996.

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